IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 217

ORVILLE COLLINS, H. D. BURKHEIMER, STANLEY LORD, JAMES E. DOGGETT and RALPH BAKER,
Petitioners,

vs.

HUGH HARDYMAN, MRS. EMERSON MORSE, MRS. TOSCA CUMMINGS and MRS. MABLE PRICE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

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Opinions Below

The opinion of the Court of Appeals for the Ninth Circuit is reported at 183 F. (2d) 308. The opinion of the District Court for the Southern District of California, Central Division, is reported at 80 Fed. Supp. 501.

Jurisdiction

This Court, acting pursuant to Section 1254(1) of the Judicial Code of 1948 [28 U. S. C. 1254(1)], granted petitioners' petition for certiorari to the Court of Appeals for the Ninth Circuit, on October 9, 1950. That Court had entered judgment on May 29, 1950 (R. 90), reversing the District Court's grant of a motion to dismiss respondents' complaint (R. 49-50), and holding that the complaint stated a cause of action under Section 47(3) of Title 8 of the United States Code (derived from Act of April 20, 1871, c. 22, sec. 2, 17 Stat. 13).

Statement of the Case

Statute to be construed (with italicization of portion directly involved in the case at bar):

§ 47. Conspiracy to Interfere with Civil Rights.

* * * * *

Depriving Persons of Rights or Privileges.

(3) *If two or more persons in any State* or Territory *conspire* or go in disguise on the highway or on the premises of another, *for the purpose of depriving, either directly or indirectly, any person or class of persons* of the equal protection of the laws, or *of equal privileges and immunities under the laws;* or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for

President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; *in any case of conspiracy set forth in this section, if one or more persons engaged therein do,* or cause to be done, *any act in furtherance of the object of such conspiracy, whereby another is* injured in his person or property, or *deprived of having and exercising any right or privilege of a citizen of the United States, the party so* injured or *deprived may have an action for the recovery of damages occasioned by such* injury or *deprivation, against any one or more of the conspirators.*

[8 U. S. C. 47(3), derived from Act of April 20, 1871, c. 22, sec. 2,17 Stat. 13; hereinafter referred to as section 47(3).]

Proceedings—On the basis of respondents' complaint praying for damages under Section 47(3) and petitioners' motion to dismiss the complaint for failure to state a cause of action, the District Court granted petitioners' motion (R. 49-50). On appeal by respondents, the Court of Appeals reversed the judgment of dismissal (R. 90).

Facts—The facts set forth in the complaint are stated in the petition for a writ of certiorari. In sum, the complaint alleged that the respondents, citizens of the United States, were officers of a local Club of the Democratic Party which had scheduled for one of its regular public meetings a discussion of the Marshall Plan and consideration of the adoption of a resolution in regard to it for forwarding to the President of the United States, the State Department and members of Congress (R. 2-5). Because of their opposition to respondents' views, petitioners, pursuant to a conspiracy, broke up the meeting, and prevented the adoption and transmission of the proposed resolution, by physically threatening and forcibly assault-

ing the respondents and other participants (R. 5-8); petitioners did not, however, interfere with public meetings, including the adoption of resolutions, respecting the foreign policies of the United States, which had been held with petitioners' knowledge by citizens expressing views with which petitioners agreed (R. 6).

Decision of the District Court—The District Court held that the complaint failed to state a cause of action, on the basis that section 47(3) does not establish a cause of action for acts of interference with Federal privileges unless committed by virtue of authority granted by a State (R. 34). While the Court took cognizance of the principle that Congress has power under the original Constitution, absent the Amendments, to protect as against private persons the privilege of assembling to petition the Federal Government and discuss national affairs (R. 20-22, 23-24), it appeared to ignore this principle in its construction of 47(3). Its holding that this conceded power under the original Constitution was not exercised in section 47(3), was based largely on the civil rights decisions of this Court which have arisen under the Thirteenth, Fourteenth and Fifteenth Amendments and have held that Congress is empowered to protect the broad categories of rights assured thereunder only against State action (R. 22, 24-26, 34-39). The District Court also relied on some of the wording of section 47(3) (R. 24-26).

Decision of the Court of Appeals—The Court of Appeals, reversing the District Court with one judge dissenting, held that the instant complaint was authorized by section 47(3) because the section applies to an attack by any person, regardless of his possession of State authority, on a right within the narrow category constituting essentially Federal privileges. The Court pointed to re-

peated and unmistakable evidence from the legislative history of Congressional intention for section 47(3) to apply to such acts as those here in issue (R. 66-68). The Court also pointed to the fact that construction of the section as applicable to private individuals was the only one which would lend its various provisions a reasonable meaning (R. 65-66), and to this Court's similar construction of identical language in another statute (R. 66).[1]

As to the constitutional power of Congress to enact 47(3) in its intended scope, the Court pointed out that while the Amendments for the most part apply only to State action, this Court has repeatedly upheld the power of Congress under the original Constitution to protect a narrow set of rights against infringement by private individuals (R. 69-70). And the Circuit Court held, on the basis of this Court's repeated assertions in dictum dating from 1876, "that the rights to assemble for the purpose of discussing the policies of the Federal Government and petitioning that Government for redress of grievances" (R. 71), which are "the rights alleged to have been violated in the instant case", "are within that narrow area of rights which Congress has constitutional power to protect from individual invasions" (R. 72).

While the Court assumed, on the basis of decisions of this Court under another statute, that the provision of 47(3) respecting a deprivation of "equal protection" was invalid, it held that only the provisions respecting "privileges and immunities" and "the right or privilege of a citizen of the United States" are here involved and are separable from the invalid phase (R. 74-75). Finally, the Court pointed out that its construction of 47(3) as authorizing the complaint at bar would not result in an

[1] In *United States* v. *Harris*, 106 U. S. 629.

undue burden of Federal litigation, because of the limited range of the essentially Federal rights to which 47(3) would be applicable under its construction (R. 72, 75).

Question Presented

The issue presented is whether the Court of Appeals was correct in holding that section 47(3) was intended to establish, and validly does establish, a civil cause of action against private persons who, pursuant to a conspiracy, use violence to prevent citizens from assembling to discuss national affairs and to petition Federal officials for the redress of grievances.

Summary of Argument

I

The decisions of this Court clearly establish that Congress had constitutional power to establish by section 47(3) a right of action on the basis of the acts alleged in the instant complaint. For, under the original Constitution, absent the amendments, Congress unquestionably has the power to protect as against private individuals as well as the States the small category of rights essential to the functioning of the Federal Government; and this category includes the right to assemble to discuss national affairs and to petition the Federal Government, which is the right alleged to have been violated in the instant action. The validity of the instant cause of action under section 47(3) thus does not depend on any of the Constitutional Amendments, and the question of whether the latter apply to individual as well as State action is irrelevant.

II

A. Both the language and the legislative history of section 47(3) show that it was intended to authorize the instant cause of action. The context of the words "two or more persons", to whom the section is in terms applicable indicates that they must be given their literal meaning; and the legislative history demonstrates beyond question that the section was intended to apply to private individuals. Furthermore, related statutes with identical language in relevant part have been repeatedly construed by this Court to apply to private individuals.

The legislative history further shows beyond doubt that the provisions respecting "privileges and immunities under the laws" and "any right or privilege of a citizen of the United States" in section 47(3), which are the provisions on which the instant complaint is based, were intended to cover the rights assured by the Federal Government directly to citizens of the United States by implication from the original Constitution; these rights include the right here involved of assembling to discuss national affairs and to petition Federal officials.

B. Since the instant cause of action is based upon and is authorized by the privileges and immunities provision of section 47(3), it is inappropriate in this case to consider the possible invalidity of the provision respecting "equal protection of the laws". But, assuming *arguendo* that the latter question should be determined herein, the equal protection provision is valid and constitutional if construed in accordance with the legislative intent. For it is clear from the legislative history that Congress did not thereby intend to refer to the protection of State laws, which would concededly raise a difficult Constitutional problem. Rather, "equal protection of the laws" was intended, with "equal privileges or immunities under the

laws" to refer to the rights granted to individuals as citizens under the original Constitution and the rights granted to them by Federal statute, with "equal protection" regarded as emphasizing Federal statutory, rather than Constitutional, rights.

C. Assuming *arguendo*, however, that the "equal protection of the laws" provision refers to State laws and is invalid, its invalidity does not affect the portion of section 47(3) invoked in the instant complaint. The underlying and dominant intent of Congress was to protect by section 47(3) whatever rights of the citizen it was empowered by the Constitution to protect as against private individuals, and it undoubtedly would have enacted section 47(3) even if it had known that the right to the equal protection of State laws was not within its protective power. Thus, under the established criterion of separability, of whether the statute would have been enacted even if Congress had realized the necessity for deleting the invalid portion, the valid portions of section 47(3) here involved are clearly separable from the equal protection provision.

D. The chance that the aid of the State police might be secured to prevent the deprivations of Federal rights at which 47(3) is aimed, or that the conduct causing the deprivation might give rise to a State cause of action, does not negate the significance of section 47(3). It is only an action specifically directed at the protection of Federal rights, with the gravity of the conduct and of the resultant damages measured by the extent of their invasion, which can vindicate the Federal rights, redress their deprivation, and serve as a nation-wide deterrent to their violation. While protection of essentially Federal rights, such as those here involved, through Federal action is necessary, their number is so small that construc-

tion of section 47(3) as authorizing the instant cause of action is unlikely to result in an excessive amount of Federal litigation.

ARGUMENT

I. Section 47(3), construed to authorize the instant complaint, is constitutional. Congress is empowered by the Constitution to protect, as against the acts of private individuals, the right of citizens to assemble peaceably to discuss national affairs and to petition federal officials.

As the Circuit Court held, it was unquestionably within the Constitutional power of Congress to provide by section 47(3) for a right of action on the basis of the acts alleged in the instant complaint.

That there is a small category of rights assured to the individual citizen by the Constitution, and that Congress has the power to protect such rights directly against the acts of private individuals as well as the States, has been incontrovertibly established by the decisions of this Court, largely in cases applying the criminal law parallel of section 47(3).[1] This power antedates, and does not depend upon, the Fourteenth Amendment; and the application of section 47(3) to attacks by private individuals on rights of this category therefore does not involve the question of whether the Amendments only apply to State action.[2] For these essentially Federal rights do "not depend upon any of the Amendments to the Constitution but arise(s)

[1] 18 U. S. C. 241 (derived from Act of May 31, 1870, Sec. 6, 16 Stat. 140); discussed *infra*, pp. 16-17.

[2] Thus, in one of the opinions upholding an application of the criminal law parallel, this Court said: "Reference to cases under * * * the Fourteenth Amendment * * * can afford no aid in the present case." (*Ex parte Yarbrough*, 110 U. S. 651, 665-6.)

out of the creation and establishment by the Constitution itself of a national government." [1] Those "rights * * * essential to the healthy organization of the government itself," [2] which are necessary to its "independence and supremacy",[3] are assured directly to the citizen by necessary implication from the original Constitution, as well as the correlative power and duty of Congress to protect them.[4]

This category of essentially Federal rights which are within the direct protective power of Congress, undoubtedly includes that which the complaint herein alleges to have been violated: to assemble peacefully to discuss Federal affairs and petition Federal officers.

In the words of this Court:

> "The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the

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[1] *In re Quarles and Butler*, 158 U. S. 532, 535. Practically identical language also appears in *Logan* v. *United States*, 144 U. S. 263, 293.

[2] *Yarbrough*, 110 U. S. at 666.

[3] *Quarles*, 158 U. S. at 537; *Logan*, 144 U. S. at 293.

[4] See especially *Logan*, 144 U. S. at 293. The rights which have been held, by virtue of this principle, in decisions under 18 U. S. C. 241, to be subject to congressional protection as against private individuals, are: the right to vote in a Federal election (*Ex parte Yarbrough*, 110 U. S. 651, and see *United States* v. *Classic*, 313 U. S. 299, 315); the right to be free from mob violence while in Federal custody and to a speedy and public trial on a Federal charge (*Logan* v. *United States*, 144 U. S. 263); right to give information to authorities regarding violation of Federal laws (*In re Quarles & Butler*, 158 U. S. 532; *Motes* v. *United States*, 178 U. S. 458); right to apply to Federal court for process [*United States* v. *Lancaster*, 44 Fed. 885 (C. C., W. D., Ga. 1890)]; right to hold Federal office and perform its functions [*United States* v. *Patrick*, 54 Fed. 338 (C. C., M. D., Tenn. 1893)]; right to testify before Federal agencies, [*Foss* v. *United States*, 266 Fed. 881 (C. C. A. 9, 1920)].

> powers or the duties of the National Government, is an attribute of national citizenship, and, as such, under the protection of and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If * * * the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute [the criminal law parallel of 47(3)]." (*United States* v. *Cruikshank*, 92 U. S. 542, at p. 552.)
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> *Semble*: *In re Quarles and Butler*, 158 U. S. 532, 535.[1]

The significance of Federal protection and implementation of this right was pointed out by the Court below when it said:

> "A representative government cannot function properly unless its officers are informed of the opinions and desires of the people whom they represent. To protect the right to assemble for the purposes alleged in this case is to keep open those vital channels of communication between government and the governed" (R. 73-74).

That Congress had the power to establish a cause of action on the basis of the facts stated in the instant complaint has not been controverted, and the only question at issue is whether this power was validly exercised in section 47(3).

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[1] See *Hague* v. *C.I.O.*, 307 U. S. 496, 512: "Citizenship of the United States would be little better than a name if it did not carry with it the right to discuss national legislation * * *" (Opinion of Justices Roberts and Black, in which Chief Justice Hughes and Justice Stone concurred in this respect). And see *Powe* v. *United States*, 109 F. (2d) 147, 151 (C. C. A. 5th, 1947). In both the *Cruikshank* and *Powe* cases, the purpose of the assemblies there in issue was the discussion only of local affairs, and it was therefore held in both cases that no Federal right was involved.

II. Section 47(3) establishes a right of civil action against individuals who, in furtherance of a conspiracy, deprive citizens of their right to assemble peaceably to discuss national affairs and to petition federal officials. The complaint therefore states a cause of action under Section 47(3).

1. Section 47(3) applies to acts of private individuals, who do not possess State authority.

A. The Language of the Statute

The plain language of section 47(3) demonstrates, as the Circuit Court pointed out (R. 65-66), that its application is not restricted to acts of individuals possessed of State authority, and that the "persons" to whom the section is in terms applicable without limitation must be read in its literal sense.

The language of Section 2 of the Act of April 20, 1871, now incorporated in 47(3),—a civil action may be brought "if two or more persons in any State or Territory" commit specified acts—stands in clear contrast to the language of the section which directly preceded it in the 1871 Act.[1] The preceding section, now codified as 8 U. S. C. 43,[2] provided that a civil action may be brought against "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory" inflicts deprivations of Federal rights. It is hardly conceivable that Congress shifted from the "under color of" language of section 43 to the "two or more persons" language of 47(3) with the intention, nevertheless, of carrying over the State authority limitation to the latter section.

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[1] Both sections are set forth in the Appendix, pp. 37-40.

[2] Set forth in Appendix, pp. 43-44.

Furthermore, the clause of section 47(3) under which the instant action is brought—"If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another for the purpose of depriving * * * any person * * * of equal privileges and immunities"—is directly followed by the clause "or for the purpose of preventing or hindering the constituted authorities of any State or Territory from" engaging in certain functions. It is wholly unreasonable to construe "persons" so that section 47(3) would establish a cause of action in the improbable circumstance that State authorities were hindered in their functions by other State agents, which would be the result if the term "persons" were limited to those possessing State authority. Finally, the coverage of "persons" in the event they "go in disguise on the highway or the premises of another" is obviously directed at any disguised individuals regardless of their possession of State authority. Thus, the context of the term "persons" in section 47(3) demonstrates that it was used in its customary and literal sense.[1]

B. Legislative History

It was the unanimous and unquestioned view of the draftsmen and sponsors of section 2 of the 1871 Act from which section 47(3) was derived, and in fact of all Congressmen who participated in the debates, that it applied

[1] As the Court stated in *United States* v. *Mosley*, 238 U. S. 383, 388, with respect to the parallel criminal section, there is no reason "to deprive citizens of the United States of the general protection which on its face [the] section * * * most reasonably affords." And see *Bomar* v. *Keyes*, 162 F. 2d 136 (C. A. 2nd, 1947), holding that the language of 8 U. S. C. 43 (the civil section relating to acts under color of State authority) must be applied in its usual and literal sense.

to the acts of private individuals, or, as one of its draftsmen said, to "any combination of men."[1] With increasing Ku Klux Klan activity as the background, the major topic of debate on the section was the constitutionality and justifiability of a sanction against private individuals; in reply to the charge of the opponents that the section would supersede State law with respect to the offenses of all private individuals,[2] spokesmen for the statute, at all times recognizing that it applied to private individuals, urged that it was concerned with their unlawful acts only insofar as Federal rights were affected thereby.[3]

The fact that the Act was entitled "An Act to Enforce the Provisions of the Fourteenth Amendment to the Con-

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[1] Statement of Representative Cook, who offered the bill which became the Act of April 20, 1871, as a substitute for a previously introduced measure, Congressional Globe, 42nd Cong., 1st Sess. (1871), hereinafter termed Cong. Globe, p. 485.

The debates were mainly concerned with the portion of the section here in issue, which became the first clause of section 47(3), because most of the other parts of Section 2 were taken over from the Act of July 31, 1861, c. 33, 12 Stat. 284.

[2] Cong. Globe, pp. 337-8, 351-3, 357, 361, 366, 376-7, 385, 396, 416, 419, 420, 429-30, 455, Appendix, p. 215.

[3] Thus, in the words of Representative Shellabarger, Chairman of the House Committee which reported out the bill that became the Act of April 20, 1871: "Of course, Mr. Speaker, the constitutional objection to this section (Section 2) is that the acts it seeks to punish, being committed within a State, can only be defined and punished as a crime under State law. It also seems thereby to assume that there are no classes of acts which both the State governments and the National government may define and punish concurrently as constituting a crime against each government. Mr. Speaker, I deny the soundness of each of these assumptions." Cong. Globe, Appendix, p. 69. See similar statements by Chairman Shellabarger, pp. 382, 478; and of Representative Dawes, member of the Committee, pp. 475-6. It is to be noted that Section 2 contained a criminal sanction as well as the civil sanction embodied in Section 47(3). See full text *infra*, Appendix, pp. 38-40.

stitution of the United States, and for other Purposes", does not mitigate against the conclusion that Congress intended the second section to apply to private individuals. As the Circuit Court pointed out with ample documentation, in the enactment of the second section, "it was the theory of Congress that the Fourteenth Amendment gave the Federal Government power to protect individual civil rights against individual action" (R. 66-67). It is similarly clear from the legislative history that the use of the word "equal" in the phrase "equal protection of the laws and equal privileges and immunities under the laws" cannot be relied upon, as it was in the District Court's opinion (R. 24-25), to contradict the conclusion that section 47(3) applies to private individuals. For the term "equal" was employed merely in order to express more clearly the Congressional intention "to confine the authority of this law to the prevention of deprivations which shall attack the equality of rights of American citizens; that any violation of the right, the *animus* and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of the remedies of this section" (Statement of Representative Shellabarger, Cong. Globe, p. 478).

Likewise the scope of 47(3) cannot be determined by a play upon the word "deprive". If there can be no "deprivation" of a right as long as there are means for its vindication (see dissenting opinion, R. 78), then it is clear that "deprivation" in Section 47(3) was intended to refer to deprivation of enjoyment of the right to equal protection and equal privileges and immunities; for if otherwise construed, the statute would senselessly establish a method

for vindicating a wrong which becomes non-existent once a method of vindication is established.[1]

C. Meaning of Parallel Provision

Section 47(3) has a criminal parallel in section 241 of Title 18 of the United States Code, which likewise imposes a sanction "if two or more persons conspire * * * or * * * go in disguise on the highway, or on the premises of another"[2] to interfere with Federal rights. Chairman Shellabarger stated that section 2 of the 1871 Act, from which 47(3) is derived, was identical in its legal grounds with the section of the 1870 Act from which 241 is derived; and it was explained that the purpose of the 1871 provision was to render the 1870 provision less vague and general, as well as to establish a civil sanction, which had not been employed in the earlier Act.[3] Thus, not only because of the identity of language but because the sections are clearly shown by the legislative history to be *in pari materia*,[4] the established construction of section

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[1] And where, as here, the deprivation of Federal rights is the issue, the argument that an action under State law can provide vindication (see dissenting opinion, R. 79), is inapplicable. For further discussion of the inutility of State actions, see *infra*, p. 33.

[2] While there are interpolations between the above-quoted terms of Section 241, as shown by the elisions, the succession of terms in the section as it originally appeared in the Act of May 31, 1870, was as above-quoted without interpolations, and was thus identical with the terms of Section 2 of the 1871 Act. Section 241 and Section 6 of the 1870 Act, from which it was derived, are set forth in the Appendix, *infra*, pp. 43, 37.

[3] Cong. Globe, Appendix, pp. 68-9; and see pp. 461, 383.

[4] Compare *Picking* v. *Pennsylvania R. Co.*, 151 F. (2d) 240, 248-9 (C. A. 3rd, 1945), where the Court held that the civil rights sections relating to acts under color of State authority (8 U. S. C. 43 and 18 U. S. C. 242) are *in pari materia* and that the civil section must be given the construction theretofore given to the criminal section by the Supreme Court. See *Southland Gas Co.* v. *Bayley*, 319 U. S. 44, 47; as to the necessity for similarity of construction of statutes *in pari materia*.

241 is highly persuasive as to the proper construction of 47(3).

It has been settled, beyond question by the cases construing section 241, that "two or more persons" means *any* persons, whether or not acting under the aegis of State Law. *Ex parte Yarbrough,* 110 U. S. 651; *Logan* v. *United States,* 144 U. S. 263; *United States* v. *Classic,* 313 U. S. 299, 315. In each of these cases, the Court rejected defendants' contention that only "state action" was proscribed by section 241.

Finally, in *United States* v. *Harris,* 106 U. S. 629, the Court construed section 5519 of the Revised Statutes, which had incorporated the very language of the 1871 Act here in issue, and it was unequivocally held that the phrase "two or more persons" refers to private individuals.[1]

2. Section 47(3), through its provisions respecting "equal privileges and immunities of the laws" and "any right or privilege of a citizen of the United States," applies to the privilege to assemble to discuss national affairs and petition Federal officials.

It is incontrovertible from the legislative history that the primary purpose of section 47(3) was to protect the rights relating to the operations of the Federal government "inherent in a citizen of the United States by virtue of the Constitution."[2] These rights had been customarily categorized, and were categorized in the debates, as "priv-

[1] Section 5519, set forth *infra,* Appendix, p. 42, embodied the criminal phase of Section 2 of the 1871 Act from which Section 47(3) was likewise derived. Other aspects of the *Harris* decision are discussed, *infra,* pp. 24-26.

[2] Statement by Representative Cook (draftsman of the substitute bill finally enacted), Cong. Globe, pp. 485-486; see similar statements by Chairman Shellabarger, Cong. Globe, p. 382; by Representative Dawes, a member of the House Committee, Cong. Globe, pp. 475-6; by Senator Edmunds, Senate Manager of the Bill, Cong. Globe, p. 695.

ileges and immunities";[1] that they were intended to be protected by the provisions respecting "privileges and immunities under the laws" [2] and "any right or privilege of a citizen of the United States,"—which are the provisions involved in the case at bar,—is thus clear and unmistakable.[3] It is likewise clear, and has not been questioned throughout this litigation, that the privilege whose violation is charged in the instant complaint—of assembling to discuss national affairs and to petition Federal officials—is one of the inherent Federal rights and thus was incorporated by reference in section 47(3).

Accordingly, since section 47(3) applies to a conspiracy by private individuals, if acts are performed in furtherance thereof, to deprive citizens of the privilege here involved, the Circuit Court was correct in its holding that the instant complaint states a cause of action.[4]

3. The Court should not in the case at bar consider the construction of the "Equal Protection" provision of Section 47(3).

Since the complaint invokes and is authorized by the provision of 47(3) dealing with deprivations of equal privileges and immunities, we submit that it is inappropriate to consider in the instant case the scope and validity

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[1] Statement of Chairman Shellabarger, Cong. Globe, Appendix, p. 69, discussed by Circuit Court, R. 67; statement of Representative Dawes, member of House Committee reporting out the Bill, Cong. Globe, p. 476.

[2] Even apart from the legislative history, such inclusion would be assumed since the Constitution is customarily described as part of the laws of the United States (i.e., see such reference in Art. VI, Sec. 2 of the Constitution).

[3] If the provision respecting acts injurious to person or property is also deemed to be invoked by the instant complaint, its application herein is limited to acts in furtherance of a conspiracy directed at "privileges and immunities under the laws".

[4] As to questions relating to the complete scope of the provisions on which the instant action is founded, see *infra*, note 2, p. 29.

of the section's provision with respect to deprivations of "equal protection of the laws", which was considered by the Circuit Court (R. 73-75). Applicable here is this Court's long-established doctrine, which the Circuit Court disregarded, that

> "We confine ourselves to so much of the act assailed as was construed and applied in the present case. If there should arise a case in which this legislation is sought to be applied * * * [which] would be beyond legislative restraint, it will be time enough for interference by the courts. As observed in *Smiley* v. *Kansas*,[1] where the breadth of the act was criticized, 'Unless appellant can show that he himself has been wrongfully included in the terms of the law, he can have no just ground of complaint.'" *Grenada Lumber Co.* v. *Mississippi*, 217 U. S. 433, 442.[2]

While there may be exceptions to this doctrine in the case of some criminal statutes (see *Thornhill* v. *Alabama*, 310 U. S. 88, 95), there is no room for an exception in the case of the instant civil statute. Indeed, restraint in review is here especially necessary, for construction of the equal protection provision impinges on difficult Constitutional questions; and Constitutional issues, in particular, "are not to be dealt with abstractly", but only when presented by the facts before the Court. *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8, 22.[3] Furthermore, an

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[1] 196 U. S. 447.

[2] "If there should be any objections to a wider application [of the statutory phrase], they do not affect the respondent and are not open here." *Young Co.* v. *McNeal* v. *McNeal Edwards Co.*, 283 U. S. 398, 400. For other examples of this often-used principle, see also *Kelly* v. *State of Washington ex rel. Foss Co.*, 302 U. S. 1, 16; *Joslin Co.* v. *Providence*, 262 U. S. 668, 675, in both of which the Court refused to consider other possible applications of the statutory sections there at bar; see also *Rindge Co.* v. *Los Angeles County*, 262 U. S. 700, 709-710.

[3] See *Heald* v. *District of Columbia*, 295 U. S. 114, 123: "It has been repeatedly held that one who would strike down a state statute as violative of the Federal Constitution must show that he is within

important issue with respect to the equal protection provision is its workability (discussed *infra*, pp. 23-24), and proper determination of this issue would be obviously aided by considering the provision in the light of its specific application.

4. Assuming *arguendo* the propriety of considering the "Equal Protection of the Laws" provision, it is valid and constitutional.

Assuming *arguendo* that the meaning of "equal protection of the laws" is to be considered, the primary guide in the resolution of any uncertainty in the language is the rule that "The obligation rests * * * upon this Court in construing Congressional enactments to take care to interpret them so as to avoid a danger of unconstitutionality" (*United States* v. *C.I.O.*, 335 U. S. 106, 120-121). And a reading of the language in the light of the legislative history demonstrates that this phrase does not embrace the "equal protection of State laws", which concededly would raise a troublesome Constitutional problem; rather, Congress used it in a broad sense to refer, with "equal privileges and immunities", to the equal enjoyment of rights assured to the individual by the Constitution by reason of their connection with the functioning of the Federal Government, or of rights granted to him by Federal statute.

The purpose of section 2 to protect the rights of United States citizens connected with the operation of the Fed-

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the class of persons with regard to whom the act is unconstitutional and that the alleged unconstitutional feature injures him (citing cases). In no case has it been held that a different rule applies where the statute assailed is an act of Congress; nor has any good reason been suggested why it should be so held" (comparing cases) (per Brandeis, J.).

eral government,[1] is underscored by the purpose of the 1871 Act as a whole. For the whole thrust of the Act is towards assurance of respect for Federal laws and for rights affecting the Federal Government's performance of its functions,[2] and thus confirms the conclusion dictated by the legislative history of the section that Congress was not concerned with the protection of State laws when it referred to equal protection.[3] Further, the legislative history shows that the phrase "equal protection of the laws and equal privileges and immunities under the laws" was intended to have the same general scope as the phrase "rights, privileges or immunities of any person, to which he is entitled under the Constitution and laws of the United States", which was the language used in the original draft of the section.[4] The change of verbiage, with inclusion of the phrase "equal protection", was not intended to import a reference to any particular right, but merely to emphasize that the acts proscribed were those depriving a citizen of the enjoyment of his rights to the same extent as

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[1] See references to legislative history, *supra*, note 2, p. 17. The statements as to the purpose of section 2 applied to all the new matter enacted, without differentiation as to particular phrases. Much of the section other than the provisions here in issue was taken over from a prior Act (see note 1, p. 14).

[2] See Act of April 20, 1871, *passim*, Appendix, pp. 37-42.

[3] All other rules are "subordinate to the doctrine that courts will construe the details of an act in conformity with its general purpose, will read the text in the light of the context, and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy." *Securities and Exchange Commission* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344, 350. An "ambiguity of phrase * * * yields to the intent of Congress as disclosed by the legislative history. In such circumstances we follow the general purpose of the Act." *Colgate-Palmolive-Peet Co.* v. *United States*, 320 U. S. 422, 429.

[4] See Cong. Globe, p. 317, for the initial form of the Bill which became the 1871 Act, and p. 477 for acceptance of substitute containing language finally enacted.

other citizens.[1] Finally, that the phrase "equal protection" does not denote any intention of referring to the protection of State laws as among those rights, is established by the statement of Senator Edmunds, the Senate Manager of the Bill, who explained that section 2 only applied to "a conspiracy to deprive citizens of the United States * * * *of the rights which the Constitution and the laws of the United States* made pursuant to it give to them; that is to say, conspiracies to impede the course of justice, conspiracies to deprive the people of *equal protection of the laws, whatever those laws may be*" (Cong. Globe, p. 568, italics added).[2]

It seems clear, therefore, that the "equal protection" phrase was not tied to the concept of the protection of State laws;[3] rather, it was intended in the same general

[1] See *supra*, p. 15.

[2] While there may be some intimations in the Congressional debates suggesting a desire for the phrase to embrace the protection of State laws as well, this Court has often noted that all claims made in the course of debate cannot be taken as authoritative; and we submit that the quoted statement of the Senate Manager, after the Bill's various revisions, is highly persuasive as to Congressional purpose.

[3] That the "equal protection" provision was not intended in this technical sense is internally evidenced by the fact that it covers persons in any Territory as well as any State.

Section 2 of the 1871 Act also contained provisions with respect to "hindering the constituted authorities of any State from giving * * * to all persons within such State the equal protection of the laws" "or * * * obstructing * * * the due course of justice in any State or Territory, with intent to deny to any citizen of the United States the due and equal protection of the laws." Despite the mention of State processes in these clauses, they may well refer to protection of the citizen's rights under *Federal laws*, in view of the provision for this type of "equal protection" by State authorities in section 3 of the 1871 Act (see Appendix, p. 41), and in view of the reference to the course of justice *in*, rather than of, any State or Territory. In any event, the meaning of equal protection in these clauses does not determine its meaning in the clause here in issue (see *Lawson* v. *Suwanee Fruit and Steamship Co.*, 336 U. S. 198, for an example of differing constructions of the same term in various parts of a statute).

sense as "equal privileges and immunities"—the two phrases to be read without sharp differentiation in the conjunctive rather than the disjunctive—with "equal protection" regarded, however, as looking more toward Federal statutory, than Constitutional, rights. Accordingly, it is clear that Congress deliberately refrained from specifying the rights covered by 47(3) in order to insure their enunciation in the light of its Constitutional power to afford protection against the acts of private individuals,[1] and that the phrase respecting "equal protection" was not so intended that it permits frustration of this purpose by construing the section as applying to rights lying outside Congressional power. Under these circumstances, to insist on construing "equal protection" as referring to State law would mean to abandon the cardinal principle of attempting to find a construction consistent with the Constitution, and to reject the construction which was intended by the Congress and would save the statute's constitutionality.

If there were any linguistic difficulty about effectuating the intention of Congress for the equal protection provision to apply to private individuals (see dissenting opinion, R. 78), "The compactness of phrasing and lack of strict grammatical construction does not obscure the intent of the Act."[2] In fact, however, if read as the legislative history dictates, the phrase has a thoroughly workable meaning; thus, in a case such as *United States* v.

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[1] See statement as to the non-specification of the rights, by Representative Dawes, a member of the House Committee which reported out the Bill, in concluding debate on it, Cong. Globe, p. 475.

[2] *United States* v. *Gaskin*, 320 U. S. 527, 529, referring to the peonage provision of the civil rights legislation.

Waddell,[1] which arose under the parallel criminal section, where a homesteader was forced off his land before he could satisfy the requirements that under Federal law would have assured his title, he would quite literally be deprived by private individuals of the equal protection of the Federal laws.

The Decision in United States v. Harris[2] Is Not Authoritative in the Case at Bar.

The *Harris* decision cannot be regarded as authority for construing the phrase "equal protection of the laws" in Section 47(3) as a reference to State laws.

The *Harris* case arose under Section 5519 of the Revised Statutes, which was later repealed; Section 5519 embodied the criminal phase of section 2 of the 1871 Act from which 47(3) was derived and incorporated language similar to 47(3) with respect to conspiracies (see Appendix, p. 42). The case involved the indictment of a number of individuals under Section 5519 for conspiracy to deprive another individual of equal protection of the laws in that they attacked him while he was under arrest by State officers. Stating that the only possible sources of power for the enactment were the 13th, 14th, or 15th Amendments or the privileges and immunities clause of Article 4, Section 2, the Court held that the equal protection provision was unconstitutional on the basis that "it applies, no matter how well the State may have performed its duty. Under it private persons are liable to

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[1] 112 U. S. 76.

[2] 106 U. S. 629.

punishment for conspiring to deprive anyone of the equal protection of the laws enacted by the State" (106 U. S. at p. 639).

Perhaps in an anxiety to assert the precept that the newly adopted Constitutional amendments only conferred narrow powers on the Federal government, the Court's opinion is based on a disregard of fundamental principles of judicial review and statutory construction which seriously weakens its value as a precedent. Under present-day doctrine it is fundamental that the Court should have considered whether there was any construction of the "equal protection" provision which would have saved its constitutionality,[1] rather than assuming, as the Court did, that the indictment was authorized by the statute, and forthwith condemning the statute as unconstitutional. Without attempting to resolve any ambiguity of language in favor of constitutionality, the Court totally ignored the legislative history, which establishes that "equal protection" in the equal protection and equal privileges and immunities provision of Section 2 of the 1871 Act was in fact intended in a sense consistent with Congressional power, and was not intended to refer to State laws (*supra*, pp. 21-23). Connected with the failure to consider the legislative history and the derivation of 5519 from the 1871 Act, was the failure of the Court to consider as the Constitutional source of authority for Section 5519, and as a lead to its correct construction, the Congressional power under the original Constitution to protect the citizen in his rights related to the functioning of the Federal government.[2]

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[1] See *supra*, p. 20.

[2] It is further to be noted that even assuming equal protection referred to State laws, the Court posited its determination of unconstitutionality on the statute's application to crimes such as burglary or assault, against which the State authorities were free and able

The problem of construction in the instant case is clearly distinguishable from that in *Harris* in that the statute there construed was criminal rather than civil; and the rule of favoring a strict construction, which might be deemed to justify the failure to seek a constitutional construction, was therefore applicable.[1] Furthermore, section 47(3) contains an explicit reference to the "right or privilege of a citizen of the United States", which did not appear in section 5519, and which highlights the Congressional intention for section 47(3) to cover only rights related to the operation of the Federal government rather than those related to State law. In view of the deficiencies of the *Harris* opinion together with the clear grounds for distinction between it and the instant case, we submit that it cannot be regarded as an authority herein.

5. Assuming *arguendo* that the "Equal Protection" Provision is invalid, it is a separable phase of section 47(3) and does not affect the validity of the portions here involved.

Assuming *arguendo*, however, that the "equal protection of the laws" provision refers to State laws in addition to or in place of Federal, and assuming that it was to that extent outside Congressional power, the validity of the parts of section 47(3) on which the instant cause of action depends, is not affected. For the dominant intent of Congress in enacting section 47(3) unquestionably was to protect whatever rights the Constitution empowered it

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to grant protection. (106 U. S. at p. 639). In fact, however, the indictment posed the narrower question of an interference with State authorities who were attempting to discharge their Federal duty of equal protection; so limited, it might have been within Congressional power, despite the fact that no Federal right is involved on the facts assumed by the Court.

[1] See *Baldwin* v. *Franks*, 120 U. S. 678, discussed *infra*, where the Court again construed section 5519 and relied on the fact that it was a criminal statute in distinguishing opinions dealing with the construction of civil statutes.

to protect against private individuals; if Congress mistakenly considered that the right to equal protection of the State laws was among these rights, this mistake does not negate, and cannot be permitted to frustrate, its underlying purpose to protect rights which, like those involved in the case at bar, the Constitution in fact places under its direct protection.

The sole criterion of separability of the various phases of statute is "What was the intent of the lawmakers?" (*Carter* v. *Carter Coal Co.*, 298 U. S. 238, 312). And this question is to be answered by determining whether, if the invalid provision had been deleted, the statute would nevertheless have been passed (ibid., at pp. 313, 315).[1] Under this test, there is no doubt of the separability of the "equal protection" portion of section 47(3). Congress was interested in legislating as to "equal protection" only because it believed the Constitution gave it the power to protect this right. It obviously would have sought to fulfill its basic purpose of protecting Federal rights against the acts of individuals even if it had known that this right was not among them.

The decision in *Baldwin* v. *Franks*, 120 U. S. 678, with respect to the separability of section 5519 of the Revised Statutes cannot be regarded as authoritative herein, for much the same reasons as the Harris decision cannot be followed. In *Franks* an individual was charged with conspiring to deprive a group of Chinese aliens of "equal protection of the laws and equal privileges and immunities

[1] "The rule is well settled that if one part of a statute is valid and another invalid the former may be enforced * * * [unless] it be * * * clear that the legislature would not have passed that part without the part that may be deemed invalid." *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, 121.

The basic problem is not affected by the presence or absence of a separability clause; the absence of such a provision merely places the burden on the supporter of the legislation to show separability (*Carter* v. *Carter Coal Co.*, 298 U. S. 238, 312).

under the laws," by conspiring to expel them from their town of residence and thus deprive them of rights they possessed under the Constitution and Treaties between the United States and China. Relying without re-examination on the *Harris* opinion that the equal protection provision of 5519 embraced the protection of State laws, the Court thereupon held that the coverage of conspiracies directed at Federal rights was inseparable from the coverage of those directed at non-Federal rights. In coming to this conclusion, however, the Court completely disregarded the legislative intent, which is the sole criterion of separability (see supra, p. 27). Instead, it rested its conclusion on the mere fact that both the invalid and the valid coverage were embraced in a single provision (120 U. S. at p. 684) a factor which is not, at least under present-day doctrine, regarded as significant.[1]

Besides the weaknesses of the *Franks* opinion, it could not in any event serve as a precedent in the instant case of a civil statute. For the Court explicitly rested its refusal to follow authorities holding statutes separable, on the ground that they were civil and that a strict construction was applicable to 5519 because it was a criminal statute (120 U. S. at p. 689). Further, the major basis for the *Franks* holding—that the provisions of 5519 there invoked embraced State as well as Federal rights—does not apply to the provisions of 47(3) here involved. As the Circuit Court pointed out, the provision of 47(3) which is here relied upon as establishing defendants' liability is that respecting acts in furtherance of a conspiracy whereby persons are "deprived of having and exercising any right or privilege of a citizen of the United States"; this clause, which did not appear in section 5519, is ex-

[1] See *Singer Sewing Machine Co.* v. *Brickell*, 233 U. S. 304, 313; and cases cited *supra*, note 2, p. 19, in which the Court upheld statutes as applied to the facts at bar, regardless of whether the statutory terms there involved might be invalid under other intended constructions.

plicitly and exclusively directed at rights under Federal law, and cannot be deemed to "embrace rights under State law" (see Circuit Court's opinion, R. 74).[1] In addition, the legislative history irrefutably demonstrates that "equal privileges and immunities under the laws", the other provision here involved, also refers to the rights of a United States citizen[2]; and since the terms privileges and immunities were used in this sense in the Fourteenth Amendment as well, no argument can be presented, as in the case of equal protection, that attention was focussed at the time of the enactment on the use of the phrase in any other sense.[3] Finally, the *Franks* opinion indicates that even under section 5519, a cause of action like the instant one, which did not rest on the equal protection provision, but only on equal privileges and immunities, might have been valid.[4]

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[1] Thus, this provision, treated as separable from that relating to acts, injurious to person or property, restricts the applicaiton of the statute to Federal rights, even if State rights are deemed inseparably embraced by the clause describing the conspiracies.

[2] See p. 17, *supra*.

[3] While it is indubitable from the legislative history that Congress was referring in the provisions here involved only to rights as a Federal citizen, it also appears that Congress hoped that the privileges it was protecting were of a broader scope than the Constitution in fact permits (see references to legislative history, *supra*, note 2, p. 17; note 1, p. 18). However, since Congress deliberately refrained from specifying them, so that the statutory phrases would be interpreted in accordance with the scope of its Constitutional powers to protect citizens directly (see *supra*, p. 23, at note 1), these phrases should not be read as incorporating all the privileges mentioned in the Congressional debates. But even if the contrary view of construction were taken, and if the problem of the entire coverage of these provisions were to be considered in the instant case despite the principles discussed in Point 3, *supra*, the valid coverage must be held separable from the invalid on the basis of the separability argument set forth in the text with respect to the equal protection provision.

[4] It is clear that the Court did not regard all of section 5519's provisions as inseparable, for it pointed out that the section might be susceptible of valid application in a Territory (120 U. S. at p. 685).

In view of the disregard in the *Franks* opinion of the Congressional intent as shown by the legislative history, and in view of the cogent grounds for distinguishing the *Franks* case from the instant one, it cannot be deemed authoritative in the case at bar.

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We submit that (1) the instant cause of action is based upon, and authorized by, the provision of section 47(3) respecting "equal privileges and immunities under the law", and that the provision respecting "equal protection of the laws" need not and should not be considered; (2) if equal protection is to be considered, the legislative history and fundamental doctrines of statutory construction require that the phrase be interpreted as referring to Federal laws; (3) even if the equal protection provision be interpreted as referring to State laws, and as outside Congressional power, the portions of section 47(3) here involved refer to Federal rights and must be treated as separably valid; for the sole criterion of separability is the legislative intent, and the purpose animating Congress to enact section 47(3) undoubtedly was its desire to protect, without particularization, the rights of citizens of the United States against the acts of private individuals to the extent it was constitutionally empowered to do so.[1]

[1] If "equal protection of the laws" were deemed to refer to State laws, and if it were deemed an inseparable part of section 47(3), it would be necessary to consider the questions ignored in *Harris* and *Franks* of whether the provision should be construed to refer to acts preventing State authorities from affording police protection, and of whether it would be valid if so construed (see note 2, p. 25, *supra*). However, we shall not brief this novel point, because of the unlikelihood of an occasion for its determination in the instant case.

6. Construction of 47(3) as authorizing the instant cause of action is an important step in the effectuation of the Federal Civil Rights legislation and will not cause an undue burden of Federal litigation.

A. This Court has already upheld the sections of the Federal Civil Rights Law providing for civil and criminal remedies for violations of Federal rights by persons acting under color of State law,[1] and section 241 providing for a criminal action against violations by private individuals[2]; the assertion of the right to a civil cause of action against private individuals, by the validation of section 47(3), is necessary to complete the pattern of protection Congress sought to establish. And, as this Court has pointed out,[3] it is of special importance to implement the sections of the civil rights act now extant, because Congress has preserved them for more than a century, despite its repeal of numerous other sections of the original civil rights legislation. Similarly, in construing the criminal parallel to section 47(3), Mr. Justice Holmes declared:

> "The source of this section in the doings of the Ku Klux and the like is obvious * * * (But the) section * * * had a general scope and used general words that have become the most important now that the Ku Klux has passed away."[4]

The remedy for a violation of Federal rights committed through the mob action of private individuals, supplied by section 241 and section 47(3), is fully as impor-

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[1] A criminal action for such a violation is provided by 18 U. S. C. section 242, upheld in *United States* v. *Classic*, 313 U. S. 299, and *Screws* v. *United States*, 325 U. S. 91; a civil action is established by 8 U. S. C. 43, upheld and enforced in *Smith* v. *Allwright*, 321 U. S. 649; *Hague* v. *C. I. O.*, 307 U. S. 496.

[2] See the series of decisions under 18 U. S. C. 241, *supra*, p. 10.

[3] *Screws* v. *United States*, 325 U. S. at p. 100.

[4] *United States* v. *Mosley*, 238 U. S. 383, 388.

tant as a remedy against violations under color of State law, in preserving the right of the people, particularly of unpopular minorities, to speak on Federal affairs as well as their other Federal rights.[1] Further, the civil cause of action is of equal significance with the criminal in the maintenance of these rights. For official reluctance to prosecute for a deprivation of Federal right may well coincide with mob hostility to it; moreover, a jury may be willing to render a civil verdict for the infringement of political rights, while viewing them with insufficient concern to impose a criminal penalty.[2] Thus, the certainty by virtue of 47(3) that redress can be sought for a violation of Federal rights, even if, because of its political significance or for other reasons a criminal prosecution is not instituted, will serve as a significant deterrent to violations, and as a safeguard of the universal security of the rights essential to a representative government.

The chance that the aid of State police may be obtained to prevent deprivations of Federal rights, as suggested by the dissenting Judge in the court below (R. 88),[3] or

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[1] Thus, District Judge Yankwich, though dismissing the complaint, stated: "We grant that the acts complained of * * * are manifestations of that ignoble mob spirit which is so abhorrent to a free, decent and democratic society * * *." (R. 40). And see the statement by Mr. Justice Clark, penned while Attorney General: "Our democracy suffers a grievous, if not fatal, blow when the processes of law and order are broken down by mob violence." Clark, *A Federal Prosecutor Looks at the Civil Rights Statute*, 47 Col. Law Rev. 175, 185 (1947).

[2] See Carr, *Federal Protection of Civil Rights* (1947), pp. 14, 60, 148-9; *"To Secure These Rights,"* Report of President's Committee on Civil Rights (1947), pp. 117-118.

[3] Consider *Robeson v. Fanelli*, decided by the District Court for the Southern District of New York, Nov. 10, 1950, per Ryan, J., in which the complaint alleged that State police officials had knowingly failed to prevent violations of section 47(3); motion to dismiss the complaint was denied. And resort after the event to a Federal cause of action could hardly deter effective state policing of meetings, as suggested by the dissenting Judge in the Court below [R. 87].

that the conduct infringing Federal rights might give rise to a State cause of action—which are possibilities in the case of all the other sections of the civil rights legislation as well as 47(3)—does not negate the importance of 47(3). The Federal Government need not rely for the protection of essential Federal rights on the inadequate and haphazard aid to be derived from diverse State remedies. It is only Federal action specifically directed at the protection of the Federal rights, with the gravity of the conduct and of the resultant damages measured in terms of their invasion, which can vindicate the Federal rights, redress their deprivation, and serve as a nationwide deterrent to their violation. The Federal right of action was established not only for the sake of the deprived citizen but also for the sake of the "healthy organization of the government itself." [1]

As pointed out in *Ex Parte Yarbrough*:

> "It is said that the states can pass the necessary law on this subject, and no necessity exists for such action by Congress. But the existence of State laws punishing the counterfeiting of the coin of the United States has never been held to supersede the Acts of Congress passed for that purpose, or to justify the United States in failing to enforce its own laws to protect the circulation of the coin which it issues" (110 U. S. at p. 659).

B. As the Circuit Court pointed out (R. 72), since the scope of the privileges and immunities derived by the citizen from the original Constitution, which are the only rights definitively assured protection by the construction here in issue, is narrow,[2] the volume of litigation arising

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[1] *Ex parte Yarbrough*, 110 U. S. 651, 666.

[2] See note 4, *supra*, p. 10 for rights in this category; see *United States* v. *Wheeler*, 254 U. S. 281; *Hodges* v. *United States*, 203 U. S. 1; *James Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, as to the limitations of this category.

from the instant construction is not likely to be large. Without considering in detail the questions of what type of Federal rights [1] and what type of interference with them, other than that here involved, might be deemed covered by 47(3), we wish to point out that the extreme view of the possible scope of the section suggested by the dissenting judge below, is not warranted by the legislative history.[2]

But, in any event, the speculative nature of the inquiry as to the possible amount of litigation under 47(3) confirms the wisdom of the Circuit Court's assertion that the section must be given effect in accordance with the legislative intent regardless of this factor (R. 75). And whatever the effect on the volume of litigation, multiple repetition of the attack on Federal rights is not and should not be required as an element of a cause of action under section 47(3) (compare District Court opinion, R. 33).[3] To force citizens to undergo repeated deprivations of their rights before redress is open to them, would discourage them from attempting to exercise their rights as citizens, and would cause violation of Federal rights to become a rooted pattern.

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[1] As to the range of rights protected, consider *United States* v. *Berke Cake Co.*, 50 Fed. Supp. 311 (E. D. N. Y., 1943) in which it was held that section 241, the criminal counterpart of 47(3), only protected those rights individuals possess *as citizens*, rather than their rights under all Federal statutes.

[2] The legislative history clearly indicates that the statute was to apply to "confederated violence" (see Cong. Globe Appendix p. 69) and not to non-violent opposition to meetings (compare dissenting opinion, R. 87).

[3] Such a requirement has no support whatever in the language or history of section 47(3), nor in the cases construing section 241, the parallel criminal provision. Nor has it support in general doctrine; thus there may be a denial of equal protection of the laws, "though it is neither systematic or long-continued." *Snowden* v. *Hughes*, 321 U. S. 1, 9-10.

CONCLUSION

The requirements for a cause of action, as set forth in Section 47(3), are fully met by the allegations of the complaint. The requirement that "two or more persons in any State * * * conspire * * * for the purpose of depriving * * * any person * * * of equal privileges and immunities under the laws," is satisfied by the allegations that petitioners within the State of California conspired to deprive respondents of their privilege under the Constitution, which was being enjoyed by other citizens, to assemble to petition Congress and to discuss national affairs. 47(3) further prescribes that "in * * * case of [such] conspiracy * * * if one or more persons engaged therein do * * * any act in furtherance of the object of such conspiracy, whereby another is deprived of having and exercising any right or privilege of a citizen of the United States, the party so * * * deprived may have an action for the recovery of damages, occasioned by such * * * deprivation, against one or more of the conspirators." Here, in furtherance of the conspiracy against respondents, petitioners intimidated and assaulted respondents, thus breaking up their assembly, and depriving them of having and exercising their privileges as citizens of the United States.

The cause of action stated in the instant complaint: acts of force and violence, pursuant to a conspiracy, to deprive citizens of their right to assemble to discuss national affairs and to petition Federal officials—is clearly within the scope of section 47(3), within the power of Congress to establish as a Federal suit, and within the sphere in which Congressional protection is highly appropriate, for it is a right long established to be essential to "the very idea of a government, republican in form." [1]

[1] *United States v. Cruikshank*, 92 U. S. 542, 552.

It is submitted, therefore, that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

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APPENDIX

Act of May 31, 1870 (16 Stat. 140).

An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes.

Sec. 6. And be it further enacted, That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court—the fine not to exceed five thousand dollars, and the imprisonment not to exceed ten years—and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the Constitution or laws of the United States.

Act of April 20, 1871 (17 Stat. 13).

An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any

State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.

Sec. 2. That if two or more persons within any State or Territory of the United States shall conspire together to overthrow, or to put down, or to destroy by force the government of the United States, or to levy war against the United States, or to oppose by force the authority of the government of the United States, or by force, intimidation, or threat to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, or by force, intimidation, or threat to prevent any person from accepting or holding any office or trust or place of confidence under the United States, or from discharging the duties thereof, or by force, intimidation, or threat to induce any officer of the United States to leave any State, district, or place where his duties as such officer might lawfully be performed, or to injure him in his person or property on

account of his lawful discharge of the duties of his office, or to injure his person while engaged in the lawful discharge of the duties of his office, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duty, or by force, intimidation, or threat to deter any party or witness in any court of the United States from attending such court, or from testifying in any matter pending in such court fully, freely, and truthfully, or to injure any such party or witness in his person or property on account of his having so attended or testified, or by force, intimidation, or threat to influence the verdict, presentment, or indictment, of any juror or grand juror in any court of the United States, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or on account of his being or having been such juror, or shall conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, or shall conspire together for the purpose of in any manner impeding, hindering, obstructing, or defeating the due course of justice in any State or Territory, with intent to deny to any citizen of the United States the due and equal protection of the laws, or to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws, or by force, intimidation, or threat to prevent any citizen of the United States lawfully entitled to vote from giving his support or advocacy in a lawful manner towards or in favor of

the election of any lawfully qualified person as an elector of President or Vice-President of the United States, or as a member of the Congress of the United States, or to injure any such citizen in his person or property on account of such support or advocacy, each and every person so offending shall be deemed guilty of a high crime, and, upon conviction thereof in any district or circuit court of the United States or district or supreme court of any Territory of the United States having jurisdiction of similar offences, shall be punished by a fine not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, as the court may determine, for a period of not less than six months nor more than six years, as the court may determine, or by both such fine and imprisonment as the court shall determine. And if any one or more persons engaged in any such conspiracy shall do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the person so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages occasioned by such injury or deprivation of rights and privileges against any one or more of the persons engaged in such conspiracy, such action to be prosecuted in the proper district or circuit court of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts under the provisions of the act of April ninth, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication."

Sec. 3. That in all cases where insurrection, domestic violence, unlawful combinations, or conspiracies in any

State shall so obstruct or hinder the execution of the laws thereof, and of the United States, as to deprive any portion or class of the people of such State of any of the rights, privileges, or immunities, or protection, named in the Constitution and secured by this act, and the constituted authorities of such State shall either be unable to protect, or shall, from any cause, fail in or refuse protection of the people in such rights, such facts shall be deemed a denial by such State of the equal protection of the laws to which they are entitled under the Constitution of the United States; and in all such cases, or whenever any such insurrection, violence, unlawful combination, or conspiracy shall oppose or obstruct the laws of the United States or the due execution thereof, or impede or obstruct the due course of justice under the same, it shall be lawful for the President, and it shall be his duty to take such measures, by the employment of the militia or the land and naval forces of the United States, or of either, or by other means, as he may deem necessary for the suppression of such insurrection, domestic violence, or combination; and any person who shall be arrested under the provisions of this and the preceding section shall be delivered to the marshal of the proper district, to be dealt with according to law.

Sec. 4. That whenever in any State or part of a State the unlawful combinations named in the preceding section of this act shall be organized and armed, and so numerous and powerful as to be able, by violence, to either overthrow or set at defiance the constituted authorities of such State, and of the United States within such State, or when the constituted authorities are in complicity with, or shall connive at the unlawful purposes of, such powerful and armed combinations; and whenever, by reason of either or all of the causes aforesaid, the conviction of such of-

fenders and the preservation of the public safety shall become in such district impracticable, in every such case such combinations shall be deemed a rebellion against the government of the United States, and during the continuance of such rebellion, and within the limits of the district which shall be so under the sway thereof, such limits to be prescribed by proclamation, it shall be lawful for the President of the United States, when in his judgment the public safety shall require it, to suspend the privileges of the writ of habeas corpus, to the end that such rebellion may be overthrown:

[There follows provisions with respect to habeas corpus and the proclamations.]

The remaining sections of the Act relate to trials of offenses thereunder, neglect or refusal to prevent the acts proscribed thereby, and its effect on previous Acts.

Revised Statutes, Section 5519.

"If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; each of such persons shall be punished by a fine of not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment."

18 United States Code

"§ 241. *Conspiracy against rights of citizens.*

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined not more than $5,000. or imprisoned not more than ten years, or both."

§ 242. *Deprivation of rights under color of law.*

Whoever, under color of any law, statute, or ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000. or imprisoned not more than one year, or both."

8 United States Code

"§ 43. *Civil action for deprivation of rights.*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the

United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. § 1979."